

1                                   **IN THE UNITED STATES DISTRICT COURT**  
2                                   **FOR THE DISTRICT OF PUERTO RICO**

3           **HECTOR DELGADO-QUILES,**

4           Plaintiff,

5                                   v.

6           **JO ANNE B. BARNHART**  
7           **COMMISSIONER OF SOCIAL**  
8           **SECURITY**

8           Defendant.

**CIVIL NO. 04-1951 (DRD)**

9                                   **REPORT AND RECOMMENDATION**

10           The case at bar was brought before the Court pursuant to the Social Security Act's judicial  
11 review provision, which authorizes any individual who requests disability benefits from the  
12 Commissioner of Social Security, but whose request has been denied, to seek review of said decision  
13 42 U.S.C. § 405(g). Upon careful review and consideration of the administrative record, as well as  
14 the parties' memoranda (Docket Nos. 7 and 9), the Court hereby **RECOMMENDS** that the case be  
15 **REMANDED** to the Commissioner of Social Security.

16           Delgado-Quiles originally filed for disability benefits on January 9, 2002 (Tr. 92), alleging  
17 that since June 2000 he has not been able to work due to severe back pain, lumbar radiculopathy,  
18 depression and anxiety. The Administrative Law Judge ("ALJ") ultimately denied his request for  
19 said benefits, concluding that Delgado-Quiles' Residual Functional Capacity assessment ("RFC"),  
20 along with the testimony of a vocational expert, evinced that "although the claimant's exertional  
21 limitations did not allow him to perform the full range of light work" he could perform jobs that are  
22 "light, unskilled and allow the claimant to alternate postural positions at will". (Tr.25). However,  
23 the ALJ based his conclusions, on mental and physical RFC's performed by *non-examining*  
24 physicians (Tr.232) which are inconsistent with the findings of plaintiff's *treating* sources.

25           First Circuit precedent requires that where no RFC assessment is performed by a *treating* or  
26 *examining* physician, a remand is generally warranted. See Rivera-Figueroa v. S.H.H.S., 858 F. 2d.  
27 48, 52 (1<sup>ST</sup> Cir. 1988); See also Heggarty v. Sullivan, 947 F. 2d. 990, 997 n. 1 (1<sup>ST</sup> Cir. 1991); Vigo-  
28 Ramos v. Commissioner of Social Secutiry, 241 F. Supp. 2d. 139,3 (D.P.R. 2003). Therefore, the

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3 ALJ is required by the law of this Circuit to rely on the RFC evaluation by a *treating* or *examining*  
4 medical expert. See Rivera Torres v. S.H.H.S., 837 F. 2d 4, 6 (1<sup>ST</sup> Cir. 1988).

5 In the instant case, the ALJ had the faculty to weigh any evidence probative of disability. See  
6 Seavey v. Barnhart, 276 F. 3d 1, 10 (1<sup>ST</sup> Cir. 2001). The ALJ erred by proceeding to determine  
7 plaintiff's RFC's without the benefit of a RFC assessment from a *treating* or *examining* source.  
8 Consequently, having rejected the treating sources' opinions as to plaintiffs' disability, the ALJ was  
9 required to base his own RFC determination on that of *treating* or *examining* medical expert, and  
10 not that of a *non-treating* medical source.

11 \_\_\_\_\_After reviewing the appellant's administrative record, the ALJ's findings, the parties  
12 memoranda of law (Docket No. 7 and 9), and the applicable law, the Court finds that the ALJ's  
13 finding that Delgado-Quiles could perform light work was not based on the RFC assessment of a  
14 *treating* physician. Consequently, the Court hereby **RECOMMENDS** that the case at bar be  
15 **REMANDED** for further proceedings consistent with the findings herein stated. This ruling in no  
16 way is intended to reflect any opinion on the ultimate merits of plaintiffs' disability claim upon  
17 remand. The ALJ is free to consider any additional and/or new evidence he/she may consider  
18 relevant.

19 Under the provisions of Rule 72(d), Local rules, District of Puerto Rico, any party who  
20 objects to this report and recommendation must file a written objection thereto with the Clerk of the  
21 Court within ten (10) days of the party's receipt of this report and recommendation. The written  
22 objections must specifically identify the portion of the recommendation, or report to which  
23 objections is made and the basis for such objections. Failure to comply with this rule precludes  
24 further appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985), reh'g denied, 474 U.S. 1111  
(1986); Davet v. Maccorone, 973 F. 2d 22, 30-31 (1<sup>ST</sup> Cir. 1992).

25 **SO RECOMMENDED**

26 In San Juan, Puerto Rico this 10<sup>th</sup> day of June, 2005

27  
28 *St. Gustavo A. Gelpi*  
GUSTAVO A. GELPI  
United States Magistrate Judge